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January 14, 2002

OFFICE OF THE
EXECUTIVE SECRETARY

David Waddell, Esq.
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: Show Cause Proceeding Against Talk.com, Inc.
Docket No. 01-00216

Dear David:

Please find enclosed for filing the original and thirteen copies of Talk.com's Brief in Support of Request to Take Depositions of Complaining Witnesses in the above-captioned proceeding.

Please call me if you have any questions.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:

Henry Walker
Henry Walker *HW*

HW/nl

c: Lyn Questel
TimPhillips, Esq.
Steve Augustino, Esq.

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

**IN RE: SHOW CAUSE PROCEEDING
AGAINST TALK.COM, INC.**

DOCKET NO. 01-00216

**TALK.COM'S BRIEF IN SUPPORT OF REQUEST TO TAKE DEPOSITIONS OF
COMPLAINING WITNESSES**

Respondent Talk.com Holding Corp., d/b/a/ Talk.com, ("Talk.com" or the "Company")¹ by its attorneys, pursuant to the Hearing Officer's Order Establishing Procedural Schedule, issued January 3, 2002, hereby submits this brief in support of the taking of depositions of selected complaining witnesses in this proceeding. As explained below, oral depositions of complaining witnesses are necessary to prepare Talk.com's defense to the preliminary findings of the Consumer Services Division ("CSD") of the Tennessee Regulatory Authority ("TRA" or the "Authority") in the Show Cause Order.

INTRODUCTION

On November 8, 2001, the Authority issued a Show Cause Order ("Order") to Talk.com. In the 115-page Order, the CSD asserts a total of 149 counts against Talk.com for alleged

¹ On April 9, 2001, Talk.com Holding Corp. changed its name to Talk America Inc. On May 7, 2001, Talk.com filed a request for name change to the TRA. On May 12, 2001, the Directors voted to defer a ruling on Talk.com's request to change its name. Outside of Tennessee, Talk.com does business under the name "Talk America" in all states except Indiana (for local service, however, Talk.com is only providing long distance within the state and is doing so as Talk America) and Texas (both local and long distance) where the

slamming, cramming and "Do Not Call" violations. Although Talk.com had engaged in lengthy discussions with the CSD staff over at least six months prior to the issuance of the Order, the Order contains numerous cramming allegations that had not been discussed in detail and contains detailed specifications of the remaining allegations. Talk.com has found that it is necessary to re-investigate each of these alleged instances in order to answer CSD's contentions.

Based upon current information, Talk.com anticipates that it will need to take oral depositions of at least 33 of the 63 complaining witnesses with knowledge of the alleged slamming and cramming incidents set forth in the Order.² In addition, Talk.com believes it will need to take depositions of virtually all of the 56 complaining witnesses alleging "Do Not Call" violations in order to adduce the circumstances of the alleged calls and to address factual defenses set forth in the Tenn. Code Ann. § 65-4-401 *et seq.* Talk.com's right to take these depositions in furtherance of its defense, and the relevance of the information to this proceeding, are discussed below.

ARGUMENT

The scope of discovery in contested cases before the TRA has been recently addressed by Director Melvin Malone sitting as Hearing Officer on BellSouth's Section 271 application.³ In

name change request is pending final approval. To date, Tennessee is the only state that has not taken any action regarding the request for name change.

² Talk.com also expects that it will be necessary to take the depositions of several witnesses from BellSouth who supplied information pertaining to the slamming allegations and who have knowledge of other relevant facts in this proceeding. Furthermore, Talk.com is examining whether it will need to take depositions of certain CSD staff members concerning their interaction with the complaining witnesses. Talk.com will address these depositions in a separate request later in this proceeding.

³ In Re: BellSouth Telecommunications, Inc.'s Entry Into Long Distance Service in Tennessee pursuant to Section 271 of the Telecommunications Act of 1996, Docket 97-00309.

an Initial Order issued September 17, 2001, at pp.3-4, Director Malone outlined the following principles which he reaffirmed in a second Initial Order issued December 10, 2001, at pp.4-5 (footnotes and citations omitted):

TRA Rule 1220-2.11 requires that discovery in contested cases before the agency be “effectuated in accordance with the Tennessee Rules of Civil Procedure.” In general, the scope of discovery in Tennessee is broad. Rule 26.02(1) of the Tennessee Rules of Civil Procedure permits parties to obtain any information that is relevant and not privileged. There are, however, possible limitations. Specifically, Rule 26.02(1) permits limitations on the discovery of information that is unreasonably cumulative or duplicative, obtainable from another source, or unduly burdensome.

Parties may choose from a variety of tools when effectuating discovery. Rule 33.01 permits parties to serve written interrogatories. Also, Rule 34.01 permits parties to serve requests to produce and permit inspection of documents. In both instances, a party that chooses not to respond to a request may object by stating the reasons for objection.

The resolution of disputes regarding discovery limitations is within the discretion of the decisionmaker. The decisionmaker must view disputes “in the context of the issues being tried and the posture of the case at the time the request for discovery is made. Additionally, the decisionmaker “should decline to limit discovery if the party seeking the limitations cannot produce specific facts to support its request.

Thus, discovery at the TRA is governed by the Tennessee Rules of Civil Procedure which, as applicable here, are identical to the Federal Rules⁴ and have been interpreted consistently with the Federal Rules.⁵ Under the state and federal rules, Talk.com “may choose from a variety of tools when effectuating discovery” (Initial Order, *supra*), including the taking of depositions. See Wright and Miller, *Federal Practice and Procedure*, Vol. 8, § 2039. If the TRA Staff opposes allowing Talk.com to take depositions, the Staff must seek a protective order

⁴ Tenn. R. Civil P. 26, which governs the issuance of protective orders, “is, in general, identical to Rule 26 of the Federal Rules.” *Austin v. City of Memphis*, 684 S.W.2d 624, 632, (Tenn. Ct. App. 1984).

pursuant to T.R.C.P. 26(c) and must show “good cause” why the depositions should not be allowed. *See Rule 26(c)*. “Good cause” must be based on “a specific demonstration of facts” as opposed to “conclusory or speculative statements” about the need for a protective order. *Frideres v. Schiltz*, 160 F.R.D. 153 (S.D. Iowa, 1993).

Protective orders prohibiting the taking of oral depositions “are rarely granted.” *Id.*, at 150. *See Wright and Miller, Federal Practice and Procedure*, Vol. 8, Section 2037 (“[M]ost requests of this kind are denied.”) and *Salter v. Upjohn*, 593 F.2d 649, 651 (5th Cir. 1979), ([A]bsent extraordinary circumstances, such an order would likely be in error.”) The Court may, however, impose limitations as to the time and place of the depositions (T.R. Civ. P. 30) or may impose other conditions to protect a deponent from “annoyance, embarrassment, oppression, or undue burden or expense.” T.R. Civ. P. 26(c). In the latter case, the moving party must demonstrate that a “clearly defined and serious injury will result” if a protective order is not issued. *U.S. v. Monsanto*, 1991 WL 533765 (W.D. Tenn.) The Court should only grant “as narrow a protective order as necessary under the facts.” *Bucher v. Richardson Hospital Authority*, 160 F.R.D. 88 (N.D. Tex. 1994). The reason why depositions are freely allowed and rarely prohibited is that other forms of discovery are “very inferior to oral examination.” Wright and Miller, *supra*, at page 513.

At this time, the Staff has only raised an oral objection to Talk.com’s announcement that it intends to take depositions. Under Rule 26, however, the Staff must move for a protective order and bear the “heavy burden of demonstrating good cause for such an order.” *Frideres v.*

⁵ In *Duncan v. Duncan*, 789 S.W.2d 557 (Tenn. Ct. App. 1990), for example, the Court addressed the scope of discovery under Tennessee law but cited repeatedly to Wright and Miller’s Federal Practice and Procedure and Moore’s Federal Practice.

Schiltz, supra, at 156. In light of Talk.com's need for discovery, which is explained below, it appears highly unlikely that the Staff could meet that burden.

Depositions of complaining witnesses are necessary in this case for four reasons. First, depositions are necessary in instances where the authorization given by the subscriber is contested. Second, depositions are necessary to explore indications of interference by BellSouth with the business relationship between Talk.com and its customers through its winback activities. Third, depositions are necessary to examine cramming complaints that allege that Talk.com billed subscribers after they provided notice of cancellation to Talk.com. Finally, depositions relating to the "Do Not Call" complaints are necessary to explore the factual defenses provided in the Tenn. Code Ann. and the Authority's implementing rules.

Disputed Authorizations. The CSD alleges approximately 34 slamming incidents in the Order. Each of the orders submitted by Talk.com were supported by letters of authorization ("LOAs") or taped third party verifications ("TPVs") that Talk.com reasonably and in good faith believed were authorized by a person with authority to select the telecommunications carrier(s) for the telephone number in question. In some of the instances the CSD now alleges were unauthorized, however, the complaining witness admits that he or she gave authorization to Talk.com, but now contends that the authorization was limited or contradicted by statements the witness allegedly made outside the taped TPV. For example, Pam Downen (Counts 33 and 34) admits that she provided authorization to Talk.com (and Talk.com has supplied CSD with the taped TPV), but she contends that authorization did not extend to intraLATA services if it would "interfere" with her area wide calling. Talk.com seeks to depose these witnesses to examine the conflicts between the witnesses' contentions as described by CSD in the Show Cause and their statements on the taped TPVs.

Similarly, some witnesses now deny the authorizations they provided to Talk.com, or contend that the authorization was revoked after it had been given to Talk.com. In the case of an authorization that the witness now denies, Talk.com seeks to conduct a deposition to explore the validity of the witness's contentions. In the case of the allegedly revoked authorizations, Talk.com has no record of the witness's actions, and seeks to conduct a deposition to determine the facts and circumstances of the alleged revocation. Examples of these types of instances include (but are not limited to) Laura Wilson (Counts 36 and 37), who admits that a telemarketer "persuaded her to switch" but contends that she subsequently requested a price list to compare the costs, and Matthews Towing (Counts 31 and 32), where Talk.com provided service for over seven months before a complaint was raised and the validity of Talk.com's taped TPV for two of the subscriber's four lines is not disputed.

Contacts with the Complaining Witnesses. In many of the alleged slamming incidents, the customers either delayed significantly before disputing authorization (*see, e.g.,* Matthews Towing (Counts 31 and 32) and Sharon Jones (Counts 27 and 28)) or were contacted by BellSouth before they "learned" that they had been slammed. Talk.com cannot determine without a deposition precisely what was said to the complaining witnesses that motivated them to claim they were slammed. However, BellSouth has made misleading statements to other Talk.com subscribers that they had been slammed and its winback techniques are under investigation in a number of states, including Tennessee. *See* Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc., Docket No. 01-00868 (formal complaint alleging that BellSouth has offered an illegal, off-tariff promotion to win back subscribers who switch to

CLECs). Talk.com seeks to investigate whether these activities have motivated subscribers in this proceeding to claim that they were slammed.⁶

Cramming Complaints. A substantial percentage of the CSD's cramming counts involve alleged billing by Talk.com after the customer cancelled service. In many of these instances, the complaint was filed several months after the alleged cancellation occurred (sometimes only after the unpaid invoice was referred to collections by Talk.com). Talk.com's investigation thus far has not identified any evidence of such cancellation requests. Moreover, Talk.com is not able to switch a customer away from its service (instead the customer must contact his or her preferred carrier to submit a change order), so it must continue providing service to the customer until that customer actually switches to a new carrier. Talk.com receives notice of such switches through "line loss" reports from the LEC, which are often delayed and/or inaccurate. Thus, the validity of any alleged billing after cancellation incidents will depend in part upon (a) the circumstances of the cancellation, *e.g.*, when the customer requested cancellation, to whom it conveyed that request and how the request was made, (b) when the customer contacted an alternative carrier to arrange for substitute service, and (c) when and how Talk.com received notice from the LEC that the customer no longer was a subscriber. Key information regarding the first two issues can only be obtained from the complaining witness through oral depositions.

"Do Not Call" Complaints. Talk.com anticipates that it will need to depose substantially all of the "Do Not Call" complainants in order to obtain essential information

⁶ In several of the instances, BellSouth contacted the complaining witness *before* it even executed Talk.com's service order. *See, e.g.*, Edith Brown (Counts 51 and 52), who alleged slamming six days before she was even switched to Talk.com. Despite the witness's apparent revocation of her authorization to Talk.com, BellSouth subsequently executed the change order.

needed to prepare its defense. For example, essential facts, such as when and to what number an unsolicited call was made and how the subscriber requested inclusion on the registry, are not available to Talk.com and may be known only by the complaining witness.

In addition, the TRA's rules provide several fact-based defenses to a "Do Not Call" allegation. *See* Chapter 1220-4-11 of the TRA's rules. For example, only residential telephone lines may be included on the "Do Not Call" registry in Tennessee. Talk.com has already uncovered evidence that at least one of the registered telephone lines was in fact a business line, thereby rendering it ineligible under the TRA's rules. Talk.com is entitled to inquire into other defenses it may have under Chapter 1220-4-11 of the rules. Much of the relevant information, however, may be obtainable only through depositions of the complaining witnesses.

CONCLUSION

For the foregoing reasons, Talk.com submits that it is entitled to take depositions of complaining witnesses in order to prepare its defense to the allegations in the Show Cause Order. The TRA's rules clearly permit broad discovery in contested cases such as this, and place upon the Staff the burden of demonstrating that depositions would be unduly burdensome. Talk.com has legitimate reasons for requesting depositions in this case, as explained above. Accordingly, Talk.com should be permitted to file notices of depositions forthwith.

Respectfully submitted,

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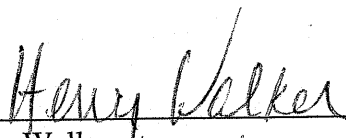
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Dated: January 14, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been delivered via fax or hand delivery and U.S. mail to the following on this the 14th day of January 2002.

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